IN THE

Supreme Court of the United States

October Term, 1954

CASE No. 199

WILSON BROTHERS,
(An Illinois Corporation),

Petitioner,

vs.

TEXTILE WORKERS UNION OF AMERICA, CIO; JOHN WM. HORTON, President, and MARTIN F. CLANCY, Treasurer, of LOCAL 675, TEXTILE WORKERS UNION OF AMERICA, CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

Wilson Brothers, the Plaintiff-Appellant in the United States Court of Appeals for the Second Circuit, has filed a Petition in this court praying that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

QUESTION PRESENTED

The issue in this case is a narrow one despite the Petitioner's assertions to the contrary. The sole question involved is as follows:

Whether, in an action brought under Section 301 of the Taft-Hartley Act, seeking a declaratory judgment as to the

meaning of certain contract language and a permanent injunction against Defendants' resort to arbitration, a District Court judgment denying Plaintiff's application for a stay of arbitration and granting Defendants' application to stay the action and require arbitration, should be regarded as an order from which an appeal may be taken to a court of appeals.

STATEMENT

The Respondent, Textile Workers Union of America, CIO (hereinafter referred to as the Union), is the statutory collective bargaining agent of the employees of the Petitioner, Wilson Brothers (hereinafter referred to as the Company), at its Troy, New York plant (A. 62a[1]). The Union has been in continuous written contractual relations with the Company and its predecessor since 1945. The most recent agreement was entered into on March 14, 1952, and expired at midnight, March 15, 1954 (A. 13a, 35a, 57a).

At the end of February, 1954, the Company closed its plant and discontinued operations (A. 62a). It neglected, however, to pay vacation pay due under the contract although three-quarters of the vacation year had elapsed when operations terminated. By virtue of Section XVI of the contract (A. 25a, 26a), employees who have at least six months of service and who have fulfilled the necessary work requirements are entitled to vacation pay.

On June 2, 1954 the Union requested payment of vacation pay to the employees who met the contract's service and work requirements (A. 39a). When the Company re-

[1] References are to pages of "Appendix to Appellant's Brief," which Petitioner has notified Respondents was filed in this court as part of the record in the court below.

fused payment, the Union submitted the dispute to arbitration in accordance with Section V of the contract (A. 42a, 43a, 15a-18a). Section V provides for the arbitration of any unresolved "difference, grievance, or dispute between the Company and the Union or any employee arising out of or relating to this agreement or its interpretation or enforcement, . . ." (A. 15a).

Thereafter the Company instituted this action in the District Court seeking a declaratory judgment of the terms of the contract and a permanent injunction restraining the Union from resorting to arbitration (A. 11a, 12a). During the pendency of the action the Company applied to the court for an order staying the arbitration (A. 53a). In response, the Union, by cross motion, applied for an order staying the action and compelling the Company to arbitrate (A. 59a). The court denied the Company's stay of arbitration and granted the Union's motion staying the action and compelling arbitration (A. 79a). It held that the dispute was arbitrable in accordance with the provisions of the contract (A. 73a-77a).

The Company appealed to the United States Court of Appeals for the Second Circuit. In reliance on this court's very recent decision in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176, the Court of Appeals dismissed the appeal. It held that the denial of the Company's application for a stay of arbitration and the granting of the Union's application for a stay of the action and an order compelling arbitration constituted an interlocutory order in an equity action concerning the manner in which the trial of the case should proceed and was therefore non-appealable as either a final order or an injunctive order within 28 U. S. C. Section 1292 (1).

ARGUMENT

A. The Federal Question Is Foreclosed By Prior Decisions of This Court.

On January 10, 1955, this court decided the case of *Baltimore Contractors, Inc.*v. *Jacob H. Bodinger,* 348 U. S. 176. The decision in that case is completely dispositive of the question presented by the Petition. It resolved the conflict in the decisions of the federal courts of appeals which then existed and on which the Company now relies to urge this court to grant review.

The *Bodinger* case involved an action for an accounting brought in a state court and removed to the federal district court on the basis of diversity of citizenship. The petitioner moved for a stay of the action pending arbitration under the terms of a contract. The District Court refused the stay. The petitioner then appealed to the Court of Appeals, Second Circuit, and that court dismissed the appeal, citing *Morgantown* v. *Royal Insurance Co.,* 337 U. S. 254.

This court granted certiorari because of the conflict between the decision of the Second Circuit and the decision of the Ninth Circuit in *Hudson Lumber Co.* v. *United States Plywood Corp.,* 181 F. 2d 929. In so doing, this court noted in footnote No. 1 to the case (p. 178) that "The *Hudson Lumber Co.* case was a suit for a declaratory judgment as to the meaning of certain contract provisions with a prayer for incidental injunctive relief. Appeal was allowed by the Court of Appeals from the District Court order staying the trial pending resort to arbitration as required by the contract."

The question for decision was described by this court as follows (p. 180):

> "... The question here presented involves the interpretation of 28 U. S. C. Sec. 1292 (1) which makes an exception to the requirement of finality, permitting appeals from 'interlocutory orders ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.' Appealability here turns on whether the District Court's refusal to stay this trial for arbitration was the refusal of an 'injunction' under Sec. 1292."

After an exhaustive review of the history of Section 1292 and its own decisions, including *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 and *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, as well as decisions of the lower federal courts, this court concluded, primarily in reliance on its *Morgantown* decision, that in an action in equity a stay of an action pending arbitration or the denial of such a stay was only a decision as to how to try the case, and therefore was not an interlocutory order in the nature of an injunction. The court reached this decision with full awareness of the importance that some interlocutory orders bear to the eventual outcome of the litigation. Quoting from the *Morgantown* case it said (p. 184):

> "'Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions.' 337 U. S., at 258."

Though the court noted that its decision may tend to preserve undesirable distinctions between actions at law and actions in equity, it nevertheless stated that the remedy lies with Congress (p. 184).

> "The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. The incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations. Some simplification would follow from an assumption or denial of jurisdiction in both. The distinction has been applied for years, however, and we conclude that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper."

The action sought to be reviewed seeks a declaratory judgment as to the terms of a contract and ancillary injunctive relief. It is indistinguishable from the *Hudson Lumber Co.* case in this respect. The order sought to be reviewed denied an interlocutory stay of arbitration and granted a stay of the action instead. It therefore combines the characteristics of the stay of the action in the *Bodinger* case with the characteristics of the stay in the *Hudson Lumber Co.* case. Out of these requests for relief emerged this court's decision in the *Bodinger* case. Manifestly, the accompanying direction to the Company herein to arbitrate is wholly without legal significance. It does nothing more than affirm and enforce the refusal to stay the arbitration and the grant of the stay of the action. It does not detract from the essence of the court's decision in *Bodinger* which was that a stay of an action in equity pending arbitration or a refusal to stay the action is only a decision as to how to try a case. As Judge L. Hand said in *Murray Oil Products Co., Inc.* v. *Mitsui & Co.*, 2 Cir., 146 F. 2d 381, 383,

"Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39 (c), . . ."

In its Petition, the Company states that the lower court's decision is in conflict with the *Hudson Lumber Co.* case, discussed *supra*. Clearly, as demonstrated above, the decision in *Bodinger* resolved this conflict.

The Company also states that the lower court's decision is in conflict with the decision of the Court of Appeals for the 4th Circuit in *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33 and with the decision of the court below in *Markel Electric Products* v. *United Electrical, Radio & Machine Workers of America*, 202 F. 2d 435. Both of these cases involved actions at law for damages for breach of contract and not actions in equity. They are therefore inapposite and present no conflict with the subject case.

There is no conflict between applicable decisions of lower courts which have not been resolved by intervening decisions of this court. There is therefore presented no federal question of substance.

B. The Decision of the District Court on the Merits Is Clearly Correct.

The District Court held that the dispute between the parties relating to vacation pay was subject to arbitration under the terms of the contract.

Section V of the agreement between the parties sets up grievance machinery to be followed by arbitration of "Any

difference, grievance, or dispute between the Company and the Union or any employee *arising out of or relating to this agreement or its interpretation or enforcement, . . .*" (Emphasis added, A. 15a). As the District Court noted, "A broader grant of arbitration jurisdiction is difficult to envisage" (A. 74a).

Moreover, to remove any doubts that arbitration covers *all* disputes and differences, the parties stated again in Section VIII, A: ". . . this agreement provides for the orderly and amicable adjustment of any and all disputes, differences and grievances, . . ." It is this promise of arbitrability which provides the consideration for the Union's no-strike pledge in Section VIII, B (A. 18a, 19a).

Nevertheless, the Company argues that the Union's claim for vacation pay does not create an arbitrable issue. Section XVI, A, of the agreement, it is urged, requires an employee to be employed on May 31st, in order to be entitled to vacation pay the following June. Section XVI, B, states that vacation pay shall be based on earnings during the full 4-week period preceding the vacation (A. 25a). The Company claims that because the agreement was terminated on March 15, 1954, neither of these conditions could be met.

The Union claims that under the Company's interpretation, vacation payments could be avoided every year, simply by closing the plant on May 30th, and May 31st each year, for then, in the Company's view, no employee would be employed on May 31st, and there would be no full 4-week period of employment preceding May 31st on which vacation payments could be based. This is obviously an absurd result, and one which the parties never intended.

The correct interpretation of the contract views Section XVI, A, as a length of service requirement whereby every employee is entitled to vacation pay, provided he meets the work requirements. The work requirements stated in Section XVI, C, require employees of less than one year's service to be "in regular attendance on a steady basis;" employees who have attained a length of service of one year or more "shall be required to have worked the greater part of each of at least 32 weeks during the year preceding May 31st" (A. 25a, 26a).

Since the employees worked through the February preceding May 31st, or nine months of the new vacation year, they exceeded the 32 week work requirement, and are entitled to vacation pay. In addition, the 32 week work requirement rebuts any assumed requirement of *active* employment on May 31st of each year, and reveals that date as a cutoff or milestone date from which vacation pay rights are calculated.

Moreover, under a proper construction of the contract, the employees were "in the employ of the employer" on May 31st. Under Section III, B (A. 15a), Section V, E (A. 17a), Section VI (A. 18a), and Section XXV (A. 34a), an employee's employment could be terminated only by a voluntary quit, or a discharge for cause, which means a discharge for disciplin .ry reasons. Neither of these events occurred: the plant closing placed the workers in the status of furloughed or permanently laid-off employees, fully entitled to all accrued rights.

Furthermore, vacation pay is accrued wages earned through the daily labors of the employees with only payment deferred. These employees, having satisfied the serv-

ice and work requirements of the contract by working nine-twelfths of the vacation year, could not be deprived of their earnings by the Company's decision to close its plant.

Even assuming, *arguendo,* that the employees have not fully performed their obligations under the contract, they are entitled to vacation pay under the well established contract doctrine of partial or substantial performance. Complete performance was excused when the Company closed its plant and thus prevented and frustrated further performance by the employees. 17 C. J. S. Section 468, pp. 969, 970; *Restatement of the Law of Contracts,* Section 295, p. 438; *Williston on Contracts,* V. 6, Section 1951, p. 5461.

For each of these propositions asserted by the Union abundant authority from the decisions of courts and arbitrators will be cited below. But apart from authority, it would immediately seem clear that the sum of the parties' assertions and counter-assertions equals a "difference, grievance, or dispute between the Company and the Union or any employee arising out of or relating to this agreement or its interpretation or enforcement" such as the parties have agreed would be submitted to arbitration.

In urging that there is no dispute to arbitrate, the Company cites *Textile Workers Union of America* v. *Firestone Plastics Division,* 6 N. J. Super. 235. The contract provision in that case expressly provided that employees laid off between March 1st and May 1st were entitled to pro-rata vacation pay, thus excluding from vacation pay employees laid off prior to March 1. The Union's claim was barred because the employees had been laid off prior to March 1. The instant contract contains no such limitation. In Section XVI, C, thereof, it grants vacation pay

to employees with service of one year or more who have worked the greater part of 32 weeks during the year preceding May 31st, thus precluding any requirement of employment on a specific date, so long as the service and work requirements are met. The contract construed in *Treloar* v. *Steggeman*, 333 Mich. 166, also cited by the Company, lacked any provision similar to the 32 week service requirement in the instant contract. Moreover, the case did not involve arbitrability but rather a direct construction by that court of a vacation pay provision in an action for vacation pay. The opinion is devoid of reasoning or analysis. The court appears unaware of the abundant authority to the contrary.

In any event, the two decisions cited by the Company stand practically alone against a large body of court and arbitration cases holding for vacation pay in circumstances almost identical to those presented herein. Many of the cases rely on contracts whose provisions are far more stringent than the contract provisions present in this case.

In re Public Ledger, 161 F. 2d 762; *In re Wil-Low Cafeterias, Inc.*, 111 F. 2d 429; *Textile Workers Union of America* v. *Paris Fabric Mills, Inc.*, 22 N. J. Super. 381; *Owens, et al.* v. *Press Publishing Co.*, 34 N. J. Super. 203; *Calvine Cotton Mills, Inc.* v. *Textile Workers Union of America*, 238 N. C. 719; *In re Port Publishing Co.*, 231 N. C. 395; *Livestock Feeds, Inc.* v. *Local Union No. 1634*, 73 So. 2d 128; *Brampton Woolen Co.* v. *Local Union No. 112, et seq.*, 95 N. H. 255; *In re Brooklyn Citizen*, 90 N. Y. S. 2d 99 (not officially reported); *Division of Labor Law Enforcement, et al.* v. *Ryan Aeronautical Co.*, 106 Cal. App. 2d 833; *American Security Life Ins. Co.* v. *Moore*, 72 So. 2d 132;

Globe Corporation, 23 LA[2] 298; *A. D. Juilliard & Co., Inc.,* 18 LA 896; *Texas Textile Mills,* 15 LA 776; *West Virginia Pulp and Paper Co.,* 15 LA 742; *Penberthy Injector Co.,* 15 LA 713; *Central Packing Co.,* 14 LA 403; *Acro Switch Co.,* 14 LA 256; *North Star Woolen Mill Co.,* 14 LA 185; *Premier Worsted Mill,* 13 LA 804; *L. Hyman Company, Inc.,* 13 LA 800; *Harnischfeger Corp.,* 13 LA 429; *Catoir Silk Co.,* 13 LA 368; *In re Book Publishers' Shipping Service,* 12 LA 1207; *In re Hein-Werner Corp.,* 12 LA 1158; *In re Wabash Corporation,* 12 LA 1037; *Mays Landing Water Power Co.,* 12 LA 860; *In re Monty Cleaners,* 9 LA 602; *In re American Blower Corp.,* 9 LA 599; *Tauton Wool Stock Co.,* 8 LA 733; *In re Ashaway Wool Mills, Inc.,* 8 LA 137; *In re McQuay-Norris Mfg. Co.,* 7 LA 671.

The Company relies on decisions of New York courts which hold that a dispute is not arbitrable if there is no basis on which reasonable men could disagree about the issue in dispute.

It is, at the least, very doubtful if the arbitration statute and decisions of the State of New York have any application to this action. The decisions of this court, and the lower federal courts, hold that arbitrability under the Federal Arbitration Act relates to procedure or remedy rather than substance. *Guaranty Trust Co. of N. Y.* v. *York,* 326 U. S. 99; *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 277, 278; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 124; *Heckers* v. *Fowler,* 69 U. S. (2 Wall.) 123, 128, 129; *Bernhardt* v. *Polygraphic Co. of America, Inc.,* 218 F. 2d 948, cert. granted May 31, 1955, — U. S. —, 99 L. ed.

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[2] The legend "LA" refers to the Labor Arbitration Reports published by the Bureau of National Affairs.

(Advance) p. 757; *Murray Oil Co.* v. *Mitsui*, 146 F. 2d 381, 383; *Parry* v. *Bache*, 125 F. 2d 493, 495; *California Prune & Apricot Growers Ass'n* v. *Catz American Co.*, 60 F. 2d 788, 790; *Wilson & Co.* v. *Fremont, etc.*, 77 F. Supp. 364, 379; *Pioneer Trust & Savings Bank* v. *Screw Machine Products Co.*, 73 F. Supp. 578, 580. The holdings of the highest court in New York are in accord with this view. *Matter of Berkovitz* v. *Arbib and Houlberg, Inc.*, 230 N. Y. 261, 270; *Meachem* v. *Jamestown, Franklin & Clearfield Ry.*, 211 N. Y. 346, 352. See also: Sturges and Murphy, *"Arbitration Under the United States Arbitration Act,"* 17 Law & Contemp. Prob. 580, 594.

The application of the Federal Arbitration Act and the inapplicability of New York law is undisputed when, as here, the action is in the federal court pursuant to the assertion of a federal right rather than by reason of diversity of citizenship. 39 *Cornell Law Quart.*, 74, 86, 87. See also: *Ass'n of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437. Moreover, the doctrine enunciated in the New York cases cited by the Company has been severely criticized by legal commentators.[3]

In any event, in view of the vast body of decisions holding that a dispute over vacation pay, in the circumstances here involved, is arbitrable, and also supporting the Union's position on the merits, it is hardly tenable to conclude that no reasonable person could disagree with the Company's contract interpretation. It seems frivolous to urge that the Union's claim does not present an arbitrable issue.

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[3] Mayer, *"Arbitration and the Judicial Sword of Damocles,"* Labor Law Journal, Nov., 1953, p. 723; Rosenfarb, *"The Courts and Arbitration,"* N. Y. Univ. Sixth Annual Conf. on Labor, p. 161.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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